

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALFRED A. SANDOVAL,)	No. C 08-0865 JSW (PR)
)	
Plaintiff,)	ORDER OF SERVICE AND
)	PARTIAL DISMISSAL;
)	DIRECTING DEFENDANTS TO
v.)	FILE DISPOSITIVE MOTION OR
)	NOTICE THAT SUCH MOTION IS
)	NOT WARRANTED
D. BARNEBURG, et al.,)	
)	
Defendants.)	

INTRODUCTION

Plaintiff, a California prisoner, filed this pro se civil rights complaint under 42 U.S.C § 1983. Plaintiff has also filed a motion to proceed *in forma pauperis*, which is GRANTED in a separate order. This Court now reviews the Complaint pursuant to 28 U.S.C. § 1915A and serves certain claims as set forth below.

STANDARD OF REVIEW

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint “is frivolous, malicious, or fails to state a claim upon which relief may be granted,” or “seeks monetary relief from a defendant who is immune from such relief.” *Id.* § 1915A(b). Pro se pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

1 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements:

- 2 (1) that a right secured by the Constitution or laws of the United States was violated, and
3 (2) that the alleged violation was committed by a person acting under the color of state
4 law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

5 Having reviewed the complaint, the Court finds Plaintiff's allegations, when
6 liberally construed, state cognizable claims that Defendants Barneburg, Beeson, Reyes,
7 Countess, Buchanan, Puentes, Perez, Tamayo and Bishop violated his Eighth
8 Amendment rights by using excessive force against him, and violated his First
9 Amendment rights by retaliating against him for his filing of inmate grievances. In
10 addition, Plaintiff's allegations, when liberally construed, state cognizable claims against
11 that Defendants Dr. Sayre, Risenhoover, and Flowers violated his Eighth Amendment
12 rights by being deliberately indifferent to his serious medical needs.

13 The complaint has failed to state a cognizable claim for relief against any of the
14 remaining Defendants. Plaintiff's allegations that various Defendants failed to properly
15 process or decide his administrative appeals does not state a claim for the violation of
16 Plaintiff's constitutional rights. *See Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir.
17 2003) (holding that there is no constitutional right to a prison administrative appeal or
18 grievance system); *Mann v. Adams*, 855 F.2d 639, 640 (9th Cir. 1988). Plaintiff has
19 failed to make any specific allegations as to how other Defendants were involved in the
20 alleged violation of his constitutional rights. To state a claim under § 1983, a plaintiff
21 must set forth specific facts as to each individual defendant's conduct that proximately
22 caused a violation of his rights. *Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988).
23 Plaintiff's inclusion of the Warden and other supervisory officials as Defendants on the
24 apparent basis that they are liable under a respondeat superior theory is insufficient. *See*
25 *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690 (1978) (rejecting concept of
26 respondeat superior liability in § 1983 context and requiring individual liability for
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1 constitutional violation). Accordingly, the claims against the remaining Defendants will
2 be dismissed.

3 CONCLUSION

4 For the foregoing reasons, the Court orders as follows:

5 1. Plaintiff has failed to state a cognizable claim for relief against Defendants
6 Tilton, Horel, Scavetta, Marquez, Pimentel, Pedroso, Kersh, Ferguson, VanderHoeven,
7 and Hall, and the claims against these Defendants are DISMISSED. The Clerk shall
8 TERMINATE these Defendants from this action.

9 2. The Clerk of the Court shall issue summons and the United States Marshal
10 shall Clerk of the Court shall issue summons and the United States Marshal shall serve,
11 without prepayment of fees, a copy of the Complaint and all attachments thereto, and a
12 copy of this order upon: **Sergeant D. Barneburg, Sergeant J. Beeson, Correctional**
13 **Officer C. Countess, Correctional Officer T. Buchanan, Correctional Officer J.**
14 **Puente, Correctional Officer J. Reyes, Correctional Officer Tamayo, Correctional**
15 **Officer Bishop, Chief Medical Officer M. Sayre, Family Nurse Practitioner S.**
16 **Risenhoover, and Registered Nurse J. Flowers, at Pelican Bay State Prison in**
17 **Crescent City, California.** The Clerk shall also mail a courtesy copy of the complaint,
18 all attachments thereto, and this order to the California Attorney General's Office and
19 serve a copy of this order on Plaintiff.

20 3. No later than **sixty (60) days** from the date of this order, Defendants shall
21 either file a motion for summary judgment or other dispositive motion, or a notice to the
22 Court that they are of the opinion that this matter cannot be resolved by dispositive
23 motion. The motion shall be supported by adequate factual documentation and shall
24 conform in all respects to Federal Rule of Civil Procedure 56.

25 a. If defendants elect to file a motion to dismiss on the grounds that plaintiff
26 failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),
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defendants **shall** do so in an unenumerated Rule 12(b) motion pursuant to Wyatt v. Terhune, 315 F.3d 1108, 1119-20 & n.4 (9th Cir. 2003).

b. Any motion for summary judgment shall be supported by adequate factual documentation and shall conform in all respects to Federal Rule of Civil Procedure 56.

Defendants are advised that summary judgment cannot be granted, nor qualified immunity found, if material facts are in dispute. If any defendant is of the opinion that this case cannot be resolved by summary judgment, he shall so inform the Court prior to the date the summary judgment motion is due.

All papers filed with the Court shall be promptly served on the Plaintiff.

4. Plaintiff's opposition to the dispositive motion shall be filed with the Court and served on defendants no later than **thirty (30) days** from the date defendants' motion is filed.

a. In the event the defendants file an unenumerated motion to dismiss under Rule 12(b), plaintiff is hereby cautioned pursuant to Wyatt v. Terhune, 315 F.3d 1108, 1119-20 & n.4 (9th Cir. 2003):

If defendants file an unenumerated motion to dismiss for failure to exhaust, they are seeking to have your case dismissed. If the motion is granted it will end your case.

You have the right to present any evidence you may have which tends to show that you did exhaust your administrative remedies. Such evidence may be in the form of declarations (statements signed under penalty of perjury) or authenticated documents, that is, documents accompanied by a declaration showing where they came from and why they are authentic, or other sworn papers, such as answers to interrogatories or depositions.

If defendants file a motion to dismiss and it is granted, your case will be dismissed and there will be no trial.

b. In the event defendants file a motion for summary judgment, the Ninth Circuit has held that the following notice should be given to plaintiffs:

The defendants have made a motion for summary judgment by which they seek to have your case dismissed. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

Rule 56 tells you what you must do in order to oppose a motion for summary judgment. Generally, summary judgment must be granted when there

1 is no genuine issue of material fact--that is, if there is no real dispute about any
 2 fact that would affect the result of your case, the party who asked for summary
 3 judgment is entitled to judgment as a matter of law, which will end your case.
 4 When a party you are suing makes a motion for summary judgment that is
 5 properly supported by declarations (or other sworn testimony), you cannot
 6 simply rely on what your complaint says. Instead, you must set out specific facts
 7 in declarations, depositions, answers to interrogatories, or authenticated
 8 documents, as provided in Rule 56(e), that contradict the facts shown in the
 9 defendants' declarations and documents and show that there is a genuine issue of
 10 material fact for trial. If you do not submit your own evidence in opposition,
 11 summary judgment, if appropriate, may be entered against you. If summary
 12 judgment is granted in favor of defendants, your case will be dismissed and there
 13 will be no trial.

14 *See Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to read
 15 Rule 56 of the Federal Rules of Civil Procedure and *Celotex Corp. v. Catrett*, 477 U.S. 317
 16 (1986) (holding party opposing summary judgment must come forward with evidence showing
 17 triable issues of material fact on every essential element of his claim). Plaintiff is cautioned that
 18 failure to file an opposition to defendants' motion for summary judgment may be deemed to be a
 19 consent by plaintiff to the granting of the motion, and granting of judgment against plaintiff
 20 without a trial. *See Ghazali v. Moran*, 46 F.3d 52, 53-54 (9th Cir. 1995) (per curiam); *Brydges*
 21 *v. Lewis*, 18 F.3d 651, 653 (9th Cir. 1994).

22 5. Defendants shall file a reply brief no later than **fifteen (15) days** after plaintiff's
 23 opposition is filed.

24 6. The motion shall be deemed submitted as of the date the reply brief is due. No
 25 hearing will be held on the motion unless the Court so orders at a later date.

26 7. All communications by the plaintiff with the Court must be served on defendants, or
 27 defendants' counsel once counsel has been designated, by mailing a true copy of the document
 28 to defendants or defendants' counsel.


8. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.
 No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local Rule 16-1 is
 required before the parties may conduct discovery.

9. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court

1 informed of any change of address and must comply with the court's orders in a timely fashion.
2 Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to
3 Federal Rule of Civil Procedure 41(b).

4 IT IS SO ORDERED.

5 DATED: May 7, 2008

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8 JEFFREY S. WHITE
9 United States District Judge
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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

ALFRED ARTHUR SANDOVAL,
Plaintiff,

Case Number: CV08-00865 JSW

CERTIFICATE OF SERVICE

v.

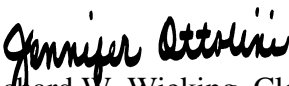
JAMES TILTON et al,
Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on May 7, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Alfred Arthur Sandoval D61000
Pelican Bay State Prison
D2-105
P.O.Box 7500
Crescent City, CA 95532

Dated: May 7, 2008


Richard W. Wieking, Clerk
By: Jennifer Ottolini, Deputy Clerk